Filed 3/10/09 In re I.C. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re I.C., a Person Coming Under the Juvenile Court Law.	B211386 (Los Angeles County Super. Ct. No. CK62230)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. C.C., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Jan Levine, Judge. Affirmed.

Merrill Lee Toole, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens and Kirstin J. Andreasen, Deputy County Counsel, for Plaintiff and Respondent.

C.C. appeals from orders denying her Welfare and Institutions Code[1] section 388 petition and terminating parental rights, in the dependency proceeding concerning her son I.C. We affirm.

Facts

This dependency began in January 2006, when I. was two years old. With I. and three of his older half-siblings in the car, Mother drove off the road and hit a light pole. I.'s 7-year-old brother was killed, and his 5-year-old sister D. fractured her skull.[2] The children were detained and a section 300 petition was filed. (The older children are not the subject of this appeal.) The factual allegations concerned the accident and Mother's history of drug use.

I. was placed with his maternal grandmother, with whom he had earlier lived, while Mother was incarcerated. He remained in that placement throughout the dependency.

The petition was sustained on June 12, 2006, under subdivisions (b) and (f). The sustained factual allegations were that on the day of the accident Mother placed the children in a situation which endangered them by driving when she had traces of marijuana and cocaine in her system and had not slept in 48 hours, that she had a history of convictions for drug related offenses and a history of substance abuse, and that she was a frequent user of illicit drugs. There was an order for reunification services, drug rehabilitation with random testing, and parenting and individual counseling.

Mother did very well at first. In February of 2006, even before the petition was sustained, she enrolled in an in-patient drug program. By June, she had successfully completed the program, which included parenting classes and counseling, and had

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[1] All further statutory references are to that code.

[2] Mother later pled guilty to vehicular manslaughter and to three counts of child abuse or neglect, and was sentenced to a year in jail, suspended, and three years of formal probation.

enrolled in a relapse prevention program. She visited consistently while she was in the program and on her completion, overnight visits began. The social worker wrote that Mother was "focused on staying sober in order to regain custody of her children." In July, Mother was given permission to live with I.'s half-siblings, who had been placed together with a relative. In September 2006, the court found that Mother had made significant progress and had demonstrated an ability to complete the objectives of the reunification plan.

However, later in September, Mother began to have problems. At some point in that month, after an argument with the older children's father, Mother left with I. and did not return him. Four days later, she called I.'s grandmother with his location, with a friend.

In February 2007, Mother was arrested for a commercial burglary.[3] By March, she had stopped testing and had been terminated from her program. Also in March, I.'s nine year old sister K. told DCFS that during weekend visits, Mother used drugs, green stuff which K. thought was "weed." Mother rolled it into papers. She did this "over and over." K. also said that Mother hit five year old D. with a belt and threatened to do the same to K.

Services were terminated on May 10, 2007. Mother waived her appearance at that hearing, and documents in the record establish that she was incarcerated, having been arrested in April.

A section 366.26 hearing was set for September 10, 2007, but was continued many times, sometimes for completion of a home study relevant to I.'s adoption by his grandmother and sometimes due to notice problems, and did not take place until September 22, 2008. In the meantime, DCFS reported several times, always with positive information about I.'s placement.

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[3] DCFS also reported that Mother was arrested for a parole violation in December, but the facts are unclear. In March, Mother's parole officer reported that Mother was abiding by the conditions of her parole.

As to Mother, in September 2007, DCFS reported that she had only had sporadic contact with I. In November 2007, DCFS wrote that I.'s grandmother ensured that he spoke to Mother on a regular basis and that I. had monitored visits with her. At a May 2008 hearing, Grandmother informed the court that Mother was again incarcerated. In June, the court received notice that Mother had been paroled, but was due in court on a felony warrant later in the month.

The August 2008, report is different. Mother had recently been in touch with DCFS, saying that she was living in a residential drug treatment program which included random testing, parenting classes and one-on-one counseling, and that she was attending AA/NA/CA nightly. She said that she opposed adoption, although she would not mind a long term guardianship, given that she was still in rehabilitation.

The section 388 petition was filed later in August. Mother asked that I. be released to her or that reunification services be reinstated. Concerning change of circumstances, she wrote that as of November 2007, she had substantially complied with her reunification plan, and also wrote that her current program took children. Concerning I.'s best interest, she wrote that she had shown significant progress and stability in her rehabilitation, had stable housing, and had had consistent visits. She wrote that she and I. had a loving bond and that further estrangement from her was not in his best interest. The petition attached documents concerning Mother's 2007 completion of a drug program and her drug tests between May and November 2007.

Shortly after filing the petition, Mother submitted additional documents, this time concerning her current treatment program: she had enrolled on May 15, 2008, was in the first phase of treatment, and was in compliance. She had a rigorous daily schedule in the program and had been testing negative for drugs. I. could live in the treatment center with her.

The court denied the petition without a hearing, finding that the fact that Mother had recently re-entered treatment and was in the first phase of her treatment did not constitute changed circumstances, and noting that although the case was almost three

years old, Mother was still struggling with the problem which caused the dependency, that is, her drug use.

When the section 366.26 hearing was called on September 10, 2008, Mother's lawyer was not present. She was represented by another lawyer from the firm, who asked that the case be continued so that Mother could be represented by the lawyer who knew the case and the issues. The court began the hearing, but trailed it to October 6 so that Mother could present evidence and arguments. On that date, Mother's counsel was present. He withdrew the contest, but asked that an objection be noted for the record if the court proceeded with termination of rights.

Discussion

The section 388 petition

Mother's contention is that the court abused its discretion when it denied her section 388 petition without a hearing.[4]

The law is well established. A parent has a right to a hearing on a section 388 petition if the petition makes a prima facie showing that new evidence or changed circumstances exist and that the proposed change in order would promote the best interests of the child. (§ 388; *In re Marilyn H.* (1993) 5 Cal.4th 295, 301.) The petition must be liberally construed in favor of granting a hearing. (*Id*. at p. 309.) We review the trial court's ruling under an abuse of discretion standard (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415), and find none.

More than two and one-half years elapsed between the time the section 300 petition and the section 388 petition. I. had spent that time -- indeed, had spent most of

[4] We cannot agree with DCFS that Mother waived or forfeited this argument when she withdrew her contest to the section 366.26 hearing. As we read the record, when she withdrew her contest, Mother acknowledged that the court's denial of the section 388 petition meant that she had no arguments. That does not mean that she agreed that the section 388 petition was properly denied.

his life -- with his grandmother. Mother visited early in the dependency, but nothing in the record indicates that her visits were frequent after she relapsed into drug use early in 2007. Most importantly, as the dependency court noted, Mother was still struggling with drug abuse. Her return to treatment is laudable, but it was not new, because she had been in treatment before, and it was not a prima facie showing that placement with Mother, or the delay that further reunification services would entail, was in I.'s best interest.

Indian Child Welfare Act

Here, Mother contends that reversal of the order terminating parental rights is required because the ICWA notices did not include sufficient information.

These are the facts: at the detention hearing, Mother said that she had Indian heritage through her father, though she did not know which tribe. Mother's father (I.'s grandfather) was in court. He had no additional information, but said that he thought he could get it. The court urged him to do so, and ordered DCFS to notice the Bureau of Indian Affairs. The next DCFS report establishes that the social worker spoke to Mother's father and Mother's sister, both of whom said that Mother's father's grandmother (that is, I.'s great-great grandmother) was American Indian, but neither of whom was able to provide any additional information.

Because the tribe was unknown, DCFS sent notice to the Bureau of Indian Affairs. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 253.) The notice included the month and year and place of birth for the alleged Indian ancestor (I'.s great-great grandmother) and the year of her death. The notice also included information about Mother, Mother's father (I.'s grandfather) and Mother's father's mother (I.'s great-grandmother). The BIA responded by writing that notice was being returned because the family had provided insufficient information substantiating any federally recognized tribe, and that a history back to 1900 was required, with names and birthdates and birthplaces to help in establishing a link with possible original ancestral tribal members.

As Mother argues and DCFS concedes, the information provided to the BIA about I.'s great-grandmother was incorrect. Her date of birth was listed as 1994 and her date of

death as 2004. Mother argues that the error requires reversal. However, we see no need for reversal, even a conditional one, because we see no prejudice. (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 576.)

The Indian ancestor was I.'s great-great grandmother, and the forms included all the information about her which the family (and thus DCFS) had. That was not enough for the BIA to find a connection to a tribe. It is inconceivable that information about the Indian ancestor's daughter would have made any difference.

Disposition

The orders denying Mother's section 388 petition and terminating parental rights are affirmed.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.